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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

ROBERT B. WISTER,
Plaintiff and Appellant,

v.

HENRY C. LEVY, as Alameda County
Treasurer-Tax Collector, etc.,
Defendant and Respondent.

A154751

(Alameda County
Super. Ct. No. HG16812551)

Robert B. Wister, appearing in propria persona here as in the trial court, appeals from a judgment of dismissal entered after the trial court sustained without leave to amend a demurrer by the Alameda County Treasurer-Tax Collector (treasurer) to Wister's second amended petition (the petition) for a writ of mandate. The dispute arose after the treasurer lost a check Wister had sent to pay a tax bill. Wister sent a new check for the amount due less \$13 to recoup his bank's stop-payment charge. When the treasurer did not accept the partial payment, Wister sought a writ to compel the treasurer to do so. The trial court sustained demurrers to his first two petitions with leave to amend. Its second order identified omissions necessary to correct in order to state a valid claim for a writ of mandate, but the petition failed to correct those deficiencies. On appeal, Wister demonstrates no error in sustaining the demurrer or abuse of discretion in denying leave to amend. We affirm the judgment.

Factual and Procedural History

The petition alleges as follows. On December 1, 2015, plaintiff sent the treasurer a check for \$440.62 to pay the first installment of his 2015–2016 property taxes.¹ The treasurer informed Wister that it had lost his check. Wister placed a stop-payment order on the check and mailed the treasurer a new check for \$427.62, representing the \$440.62 due less \$13 for a stop-payment charge. The treasurer returned the \$427.62 check.

On April 1, 2016, Wister issued a new check for \$440.62 to pay his April 2016 tax installment. He mailed the new check along with the previously returned check for \$427.62, expecting the treasurer to apply the \$427.62 check to the December 2015 installment and the \$440.62 check to the April 2016 installment. The treasurer kept the check for \$440.62 but again returned the \$427.62 check. On April 21, Wister filed a mandamus petition to compel the treasurer to negotiate both checks. On April 22, the treasurer negotiated the \$440.62 check and applied it to the December 2015 installment. The treasurer sent Wister a demand to pay the April 2016 installment, plus penalties.

In September 2016, the treasurer demurred to Wister’s petition. In October 2016, while that demurrer was pending, Wister filed what he later described as “[a] claim . . . with Alameda County Supervisors.” Neither his first nor second petition provides further detail about the “claim.”

¹ Wister attached a note to the December 1 payment explaining that he was paying \$440.62 instead of the billed amount (\$593.44) because the bill included a \$305.64 charge for waste-removal services that was invalid, given his longstanding agreement with the City of Hayward’s waste-removal franchisee that it would not service his house. Wister subtracted \$305.64 from his bill and sent a check for the first installment in the corrected amount of \$440.62 (\$593.44 less one half of \$305.64). The city later asked Alameda County to delete the \$305.64 charge from Wister’s tax bill, which it did. It is thus undisputed that the correct amount of Wister’s bill was \$440.62 per installment, and that he never owed the \$305.64. Nonetheless, his petition alleges that, because the city stated that its “franchisee” had reported the \$305.64 alleged delinquency, the city thereby “designate[d] the removed \$305.64 as [a] property tax imposed by such franchisee in violation of article XIII of the California Constitution.” These allegations have no significance in view of Wister’s additional allegations that the improper charge was removed from his tax bill and never paid.

In November 2016, the trial court granted the treasurer's request for judicial notice of its records of Wister's tax payments, and sustained its demurrer to his initial petition with leave to amend. Wister then filed his first amended petition. He alleged that, by applying the \$440.62 check to the December 2015 installment, and then demanding payment of the April 2016 installment, the treasurer violated statutes making it a crime for public officers to falsify public records. (Citing Gov. Code, §§ 6200, 6203.) Wister did not add to his petition any cause of action other than his claim for a writ of mandamus. However, he did add an exemplary damages attachment requesting \$30 per hour he had spent on the matter plus \$980,000 as the value of his house. The treasurer again demurred.

After a hiatus in the litigation for medical reasons, the court in February 2018 sustained the demurrer to the first amended petition with leave to amend. Its order explained that Wister could claim "that the treasurer refused to accept [his] first tax payment [when] initially submitted," but he "must address why the claim . . . is not moot given that the treasurer has accepted payment of \$440.82 on the first tax installment due." As to the April 2016 installment, the court noted that Wister could "assert a claim that the treasurer refused to accept [his] second tax payment [when] initially submitted," but cited statutes "suggest[ing] that the treasurer has the discretion whether to accept partial payment." The court thus warned Wister that, "if [he] submitted a payment for less than the full amount due, then the [petition] must state facts suggesting that the treasurer was required to accept a partial payment." Finally, the court explained the necessity to allege exhaustion of administrative remedies and that, if Wister "asserts that he is entitled to an offset for his \$13 stop payment charge, then his administrative remedy is to seek a refund under Rev[enue] and Tax Code [sections] 4985, 4986 or 5096 et seq. and Alameda County Admin[istrative] Code [section] 2.116.060." The court stated it was unclear whether the allegation that Wister had filed "a claim" meant an administrative claim for a tax refund.

Wister then filed the petition now before us. Despite the court's directions, that petition alleges without elaboration or material change that "[a] claim has been filed with Alameda County Supervisors [on] October 6, 2016." Moreover, the petition does not

allege facts showing that the treasurer had a mandatory duty to accept the partial payment of \$427.82. Instead, Wister alleged that the treasurer “falsified the payment of April 1 2016 misappropriated to December 1 payment.”

The trial court sustained the demurrer to the petition without leave to amend. It held that Wister had not alleged facts showing the treasurer’s failure to perform a clear, present legal duty, citing *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 539–540, superseded by statute on other ground as stated in *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1083. Given that the treasurer had accepted Wister’s \$440.82 payment while rejecting his \$427.82 payment, Wister had not alleged any “tendered [payment] in the correct amount that respondent did not accept.” Nor had he alleged facts suggesting that the treasurer “was legally required to accept [his] partial payment” or had acted unlawfully in applying his one full payment to the December 2015 installment instead of the April 2016 installment. In addition, Wister had not alleged facts showing exhaustion of administrative remedies. Alleging that “[a] claim has been filed with [the] Alameda County Board of Supervisors” did not “satisfy petitioner’s pleading burden” in light of the court’s direction to clarify whether the identical phrase in the first amended petition meant an administrative claim for a tax refund.

Noting that Wister had not explained how he could amend his petition, the court sustained the demurrer without leave to amend. Wister timely appealed.

Discussion

“ ‘On review of an order sustaining a demurrer without leave to amend, our standard of review is de novo, “i.e., we exercise our independent judgment about whether the complaint states a cause of action as a matter of law.” [Citation.]’ [Citation.] ‘ “ ‘We treat the demurrer as admitting all material facts properly ple[d], but not contentions, deductions or conclusions of fact or law. [Citation.] . . . ’ ” ’ [Citation.] ‘We affirm if any ground offered in support of the demurrer was well taken but find error if the plaintiff has stated a cause of action under any possible legal theory.’ ” (Walgreen Co. v. City and County of San Francisco (2010) 185 Cal.App.4th 424, 433.) In reviewing the ruling, “we give the

complaint a reasonable interpretation, reading it as a whole and its parts in their context.” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) If, as here, the court sustained the demurrer without leave to amend, we must decide if there is a reasonable possibility that the plaintiff could cure the defect with an amendment. (*Ibid.*)

Wister’s five-page brief does not address, let alone refute, the trial court’s order which explained why the petition fails to state a cause of action. Wister merely repeats his factual allegations, accompanied by strings of unexplained citations to multiple statutes and flourishes of anti-government rhetoric.

Wister does suggest that he seeks to state a cause of action in tort. With regard to the return of his \$427.82 check, he asserts, “Torts ([Rev. & Tax. Code,] § 4986[, subd. (a)](2), 5096[, subd.] (c); [Gov. Code,] § 815.6, 905, 942, 6200.)” But the cited provisions direct county auditors to cancel or refund only payments for taxes levied erroneously or illegally, as was done here with respect to the waste removal charge (see fn. 1, *ante*). (Rev. & Tax. Code, §§ 4986, subd. (a)(2) [cancellation], 5096, subd. (c) [refund].) Three of the cited Government Code sections appear in the Government Claims Act. (Gov. Code, § 810 et seq.) None makes the treasurer’s alleged conduct a tort. Government Code section 6200 makes it a crime for a public officer to destroy, alter, or falsify a record deposited in a public office or placed in the officer’s hands. Wister neither cites authority suggesting that this criminal provision creates a private cause of action nor explains how the treasurer’s use of his \$440.82 check to pay the December 2015 installment instead of the April 2016 installment entailed falsifying a record. Wister has not shown that he can state a cause of action in tort.

Wister’s only other pertinent citations are to Revenue and Taxation Code sections 2611.4 and 2636. Section 2611.4 affords discretion not to collect a tax of \$20 or less. Section 2636 allows a tax collector, “with the approval of the board of supervisors,” to treat a deficient tax payment as a partial payment. Each section is explicitly discretionary. (Rev. & Tax Code, § 2611.4 [“[a]ny county department, officer or employee *may* refrain from collecting”]; Rev. & Tax Code, § 2636 [“the tax collector . . . *may* accept [a] partial payment,” *italics added*].) In sustaining the demurrer to the first

amended petition, the court cited section 2636 as one of several provisions suggesting “that the treasurer has the discretion whether to accept partial payment.” Because a writ of mandate may be issued only to compel enforcement of a clear, present, and usually ministerial duty (*Santa Clara County Counsel Attorneys Assn.*, *supra*, 7 Cal.4th at pp. 539–540), and not to control the exercise of discretion, the court warned Wister that his petition must “state facts suggesting that the treasurer was required to accept a partial payment.” Neither the petition nor his brief on appeal does so.

One may question why Wister has persisted with this litigation rather than following the trial court’s implicit advice to simply file an administrative claim for a \$13 refund and, equally troubling, why the treasurer has failed to exercise its discretion to allow the small deduction to compensate for its loss of Wister’s original check. Nonetheless, those are not matters within the courts’ purview to decide. We must follow the law and affirm that mandate is not available to compel the manner in which discretion should be exercised.

Moreover, the order sustaining the treasurer’s demurrer is also correct for another reason: the failure to properly allege exhaustion of administrative remedies. Exhaustion is an element of a mandamus cause of action that must be pled in the petition. (*Temescal Water Co. v. Dept. of Public Works* (1955) 44 Cal.2d 90, 106.) Wister never has clarified whether the “claim” he filed with the “Alameda County Board of Supervisors” was the requisite tax refund claim (Rev. & Tax Code, § 5096 et seq.), a Government Claims Act claim (Gov. Code, § 905 et seq.), or some other claim.² Before filing a refund claim, a

² At oral argument, Wister asserted that a copy of the claim is in the record on appeal at “Sup App 11.” Wister has not filed any supplement to the appellant’s appendix. Page 11 of the appendix is part of Wister’s opposition to the first demurrer; it states only that “[a] claim has been filed with Alameda County Supervisors.” Wister also referred to a CD containing document and image files that he attached to the appendix. No copy of the claim appears on the CD. The CD does include an unintelligible document that Wister apparently mailed to the trial court on June 29, 2017, and may have intended as an informal offer of settlement. The document refers to remedies under “AC/AS 2.116.060/2.116.070” and states, “Currently referred to Supervisor Valle’s office. With

taxpayer must pay the disputed tax (Rev. & Tax Code, § 5097, subd. (a)(1)); the petition does not allege that Wister did so. After the trial court noted the first amended petition's ambiguity as to what type of "claim" Wister had filed, he failed to clarify the point in his petition and has not addressed it on appeal. Dismissal was proper on this basis as well.

We need not recite every other code section cited without explanation in Wister's brief. Suffice it to say that he has failed to make a reasoned argument supported by authority that identifies error in the challenged ruling. (*Thomas v. Shewry* (2009) 170 Cal.App.4th 1480, 1485 ["Regardless of the fact that we review issues of law de novo, it remains [plaintiff's] duty as an appellant to demonstrate error in the trial court's reasoning."].)

Disposition

The judgment is affirmed. The treasurer shall recover its costs incurred on appeal.

POLLAK, P. J.

WE CONCUR:

TUCHER, J.
BROWN, J.

discovered CLAIM FORM. [¶] Claim now totals \$1,958.74." But no copy of the claim appears in the document or elsewhere on the CD.